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SUPREME COURT, U. S.

No. 73-456

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HIPOLITO MARTINEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, a citizen of Mexico, challenges his deportation, on the ground that the evidence that he accepted money for assisting aliens to enter the United States illegally was not clear, unequivocal, and convincing; he further contends that as an alien parent of children born in the United States his deportation is invalid, since it would require his citizen children either to submit to *de facto* deportation or to be without their father.

Petitioner is a native and citizen of Mexico, who entered the United States in June 1966 as an immigrant. On November 16, 1970, the Acting District Director of the Immigration and Naturalization Service issued an order to show cause why he should not be deported, alleging that petitioner was deportable under 8 U.S.C. 1251(a)(13), in that, within five years after entry, he

knowingly and for gain assisted other aliens in trying to enter the United States illegally. Following a deportation hearing before a Special Inquiry Officer, petitioner was ordered deported. The Board of Immigration Appeals dismissed petitioner's appeal, thereby affirming the order of the hearing examiner (R. 14-18).[1] Petitioner then sought review in the court of appeals pursuant to 8 U.S.C. 1105a. That court dismissed the petition after a review of the case and with a written opinion (Pet. App.; 480 F. 2d 117 (C.A. 5)). Petitioner has been granted a stay of deportation by the Immigration and Naturalization Service pending this Court's disposition of the case.

1. Petitioner's contention (Pet. 4-13) that there was not "clear, unequivocal, and convincing evidence" (See *Woodby* v. *Immigration Service*, 385 U.S. 276, 286) that he assisted the entry of the aliens for gain is without merit. At a deportation hearing held on November 25, 1970, five witnesses testified that on or about September 21, 1970, they met petitioner in Juarez, Mexico, and that petitioner agreed to assist them to enter the United States in return for being paid various sums of money (R. 43, 84, 101, 110-111, 120-121, 143, 145, 149). While one witness, Encarnacion Rodriquez, testified that he did not personally give petitioner any money (R. 89), he did testify that his brother was to pay petitioner for assisting him to enter the United States and that petitioner told him that the money had been

[1] "R." designates the certified administrative record of the proceedings in this case before the Immigration and Naturalization Service, which we are lodging with the Clerk.

paid (R. 84).[2] The hearing examiner disbelieved petitioner's testimony that the money he received was for travel expenses and that he received no profit from his participation in the scheme (R. 134-135). At the conclusion of the hearing the special examiner found, *inter alia*, that (R. 34-35):

> It is impossible to believe that [petitioner] acted other than under venal prompting. The testimony of the five illegal aliens, which was not impeached by the strong cross-examination on the part of counsel for the respondent, showed definitely that the respondent was paid a sum of money for the assistance furnished to each of the five in entering the United States illegally and that he expected to receive additional money from them after they had arrived in Chicago and had found work. The testimony shows that the respondent refunded part of the money, the amount of $80.00 for each of the five aliens, to be used in purchasing air transportation from El Paso to Chicago. The remainder of the money was never refunded by the respondent other than the perhaps small amounts expended in payment of taxi fares for them after they were successful in having entered El Paso illegally.

The hearing officer decided the issue correctly. Considering the testimony of all five witnesses that they paid money to petitioner, the fact that there may have been some variation in the details of the testimony does not negate the clear, unequivocal and convincing evidence that petitioner was smuggling aliens into the

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[2] On December 14, 1970, petitioner pleaded guilty in the United States District Court for the Western District of Texas to having aided and abetted three of these witnesses to elude examination and inspection by Immigration officials.

United States for profit. See *Kokkinis* v. *District Director*, 429 F. 2d 938, 941-942 (C.A. 2); *Yaldo* v. *Immigration and Naturalization Service*, 424 F. 2d 501, 503 (C.A. 6); *Rodriques* v. *Immigration and Naturalization Service*, 389 F. 2d 129, 132-133 (C.A. 3).

2. Petitioner further contends that the deportation order is invalid, since his minor citizen children would have to submit to *de facto* deportation and accompany him to Mexico or in the alternative suffer the hardship of petitioner's absence from their home (Pet. 14-21).

The fact that an alien begets children in the United States does not render him immune from deportation. See *Aalund* v. *Marshall*, 461 F. 2d 710, 714 (C.A. 5); *Tsaconas* v. *Immigration and Naturalization Service*, 397 F. 2d 946, 948 (C.A. 7); *Castillo-Lopez* v. *Immigration and Naturalization Service*, 437 F. 2d 74, 76 (C.A. 5); see also the government's responses in *Jesus Martinez-Rodriguez* v. *Immigration and Naturalization Service*, No. 73-5189, petition for a writ of certiorari pending; *Mangabat* v. *Immigration and Naturalization Service*, No. 72-6751, certiorari denied, October 9, 1973.

Moreover, petitioner may avoid the claimed hardship of family separation by taking his family with him when he departs this country. To do so would not constitute *de facto* deportation of the children, who by reason of their natural citizenship would be at liberty eventually to return to this county. See *Aalund*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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